Date: MARCH 10, 1999

Case No. 1999-CAA-0004

In the Matter of:

TOD ROCKEFELLER,

Complainant

v.

CARLSBAD AREA OFFICE (CAO),
U.S. DEPARTMENT OF ENERGY;
WESTINGHOUSE ELECTRIC COMPANY,
A DIVISION OF CBS, INC., AND
WESTINGHOUSE ISOLATION DIVISION (WID),

Respondents.

Before: Edward C. Burch
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Complainant, through counsel, Edward A. Slavin, Jr., has filed four complaints alleging acts of discrimination against the Department of Energy and Westinghouse Electric Company, under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31101 *et seq.* and the Clean Air Act, 42 U.S.C. §7622. The actions filed by Complainant were: (1) 98-CAA-10 and 11; (2) 99-CAA-1; (3) 99-CAA-4; and (4) 99-CAA-6. At issue in the instant Recommended Decision and Order is Complainant's third complaint, 99-CAA-4.

Findings of Fact and Conclusions of Law

On May 9, 1998, Complainant, through counsel, filed his first complaint, 98-CAA-10 and 11, with the Occupational Safety and Health Administration (OSHA) alleging retaliation under the Surface Transportation Assistance Act (STAA) and the Clean Air Act (CAA). Both Respondents, the U.S. Department of Energy (DOE) and Westinghouse Electric Company

(WEC), filed Motions to Dismiss and To Stay All Discovery pending the resolution of their Motions to Dismiss. On August 18, 1998, Administrative Law Judge Henry Lasky issued multiple orders including Orders to Show Cause to Complainant as to why the Motions to Dismiss filed by each of the Respondents should not be granted. On September 10, 1998, Complainant filed his response to the Orders to Show Cause.

On September 28, 1998, Judge Lasky issued a Recommended Decision and Order in 98-CAA-10 and 11 dismissing all claims against Respondents. That Decision and Order has been appealed by Complainant to the Administrative Appeals Board. On September 28, 1998, Judge Lasky also issued an order barring Complainant's counsel from appearing before him in this or any other matter. Consequently, the following three complaints were assigned to the undersigned.

On August 4, 1998, Complainant's counsel, on behalf of Complainant, filed a Freedom of Information Act (FOIA) request with the DOE Albuquerque Operations Office (AL) requesting copies of certain records. Specifically, counsel requested copies of: (1) the telephone records of several AL employees; (2) any DOE legal bills for Whistleblower issues; (3) legal audits of AL and DOE's Carlsbad Area Office; (4) a government ethics file for a former Carlsbad Area Office manager; and (5) any and all documents regarding Complainant that exist in AL, the Carlsbad Area Office, the Office of Hearings and Appeals, DOE Headquarters, or WEC. (Decision and Order of DOE, Attachment to Complainant's third complaint). In the request, Complainant's counsel stated that a full fee waiver was appropriate because the FOIA request was in the public interest of preventing, detecting, and exposing government fraud. (Decision and Order of DOE, Attachment to Complainant's third complaint). DOE AL denied Complainant's request for a fee waiver because it determined that Complainant's action was personal in nature, that Complainant's counsel made the request in his own commercial interest, and that Complainant's request was not likely to contribute significantly to public understanding of the operation and activities of the government. (Decision and Order of DOE, Attachment to Complainant's third complaint).

On October 2, 1998, Complainant, through counsel, filed a second complaint, 99-CAA-1, with OSHA. In the second complaint, Complainant's counsel stated that the "facts in Mr. Rockefeller's first complaint, dated May 9, 1998, are incorporated by reference." (Complainant's second complaint). Complainant's counsel also alleged that Respondents DOE and WEC wrongfully induced Judge Lasky to recommend dismissal of the first complaint and that the Recommended Decision and Order was contaminated by *ex parte* contacts between Respondents, OSHA, and Judge Lasky. The second complaint further alleged that a DOE lawyer had an improper motive and gave improper legal advice to the AL personnel about Complainant's FOIA request which allegedly resulted in DOE denying Complainant's fee waiver request and attempting to charge him $28,000 for 1200 hours of search time under FOIA. (Complainant's second complaint). Complainant alleged that the $28,000 charge was an act of discrimination, to impede and delay Complainant's ability to obtain evidence of environmental violations, and in retaliation for engaging in "environmental protected activity." Complainant alleged that

Respondents' actions were an obstruction of his Whistleblower rights and a continuing violation under the STAA and CAA. (Complainant's second complaint).

The undersigned issued an Order to Show Cause on November 6, 1998, which ordered Complainant to show cause, by November 20, 1998, why the second complaint should not be dismissed. The parties were given the opportunity to present briefs. Both Respondents submitted Motions to Dismiss arguing that the issues raised by Complainant under the STAA and CAA in the second complaint were barred by the doctrine of collateral estoppel and that the Department of Labor lacked jurisdiction over the FOIA allegation.

On December 4, 1998, the undersigned issued a Recommended Decision and Order in 99-CAA-1 dismissing Complainant's claims, with prejudice. Although I granted Respondents' Motions to Dismiss in the decision, my decision was based solely upon the failure of Complainant to meet the requirements of the Order to Show Cause. Complainant's Order to Show Cause contained no facts to support his allegations of improper *ex parte* contacts and undue influence. Further, I found that the allegations of the first complaint, which were incorporated into the second complaint, were subject to collateral estoppel and Complainant's remedy was that of appeal. With respect to the new allegations, I found that they were not supported by the evidence. The allegations of improper conduct by Judge Lasky were dismissed under the doctrine of collateral estoppel and as unfounded attempts to impugn the integrity of the trial Judge for the reason that the Judge's rulings were adverse to the Complainant. With regard to the FOIA allegation, I found that an attempt by DOE AL to charge a copying fee failed to state a cause of action under the Clean Air Act, collateral estoppel was applicable, and Complainant's remedy, if any, was appeal. Complainant appealed my Recommended Decision and Order in 99-CAA-1 to the Administrative Appeals Board.

On October 28, 1998, the Director of the Office of Hearings and Appeals issued a Decision and Order of the Department of Energy regarding Complainant's FOIA fee waiver request. (Decision and Order of DOE, Attachment to Complainant's third complaint). In his decision, the Director set forth the two-prong test for determining whether a fee waiver should be granted and determined that Mr. Rockefeller did not satisfy prong one of the test in that release of the requested material would not contribute to the general public's understanding of the subject.[1]

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[1] FOIA permits agencies to charge search and duplication fees to requesters. 5 U.S.C. §522(a)(4)(A); *Carney v. United States Dep't of Justice*, 19 F.3d 807, 814 (2nd Cir. 1994). Section 552(a)(4)(A)(iii) provides that the fees shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(A)(iii); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Carney*, 19 F.3d at 814. The requester is assigned the burden of showing that the fee waiver standard has been met. *Carney*, 19 F.3d at 814; *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (*per curiam*).

The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. 10 C.F.R. §1004.9(a)(8). The regulations set forth four factors which must be considered by the agency in order to determine whether disclosure of the requested information is in the public interest: (A) whether the subject of the requested records concerns "the operations or activities of the government;" (B) whether the disclosure is "likely to

The Director noted that considering Mr. Rockefeller had not satisfied prong one of the test, the DOE need not consider prong two. However, the Director mentioned in a footnote:

> we do not agree with AL's conclusion that Slavin should be designated a commercial requester because his client did not prevail in previous whistleblower actions. We have no evidence that Rockefeller's current action is 'personal in nature' as AL contends, or that Rockefeller is not pursuing a new action seeking compensation or retribution for wrongs he allegedly suffered.

(Decision and Order of DOE, Attachment to Complainant's third complaint).

On November 2, 1998, Complainant filed a third complaint, 99-CAA-4, with OSHA. In the third complaint, Complainant's counsel states that the "facts in Mr. Rockefeller's first complaint, dated May 9, 1998, and his second complaint, dated October 2, 1998, are incorporated by reference." (Complainant's third complaint, Para. 1). In the third complaint, Complainant's counsel also alleges that following the decision by the Director of the DOE Office of Hearing and Appeals there is "now no defense on the merits to Mr. Rockefeller's *prima facie* case regarding FOIA harassment by DOE AL." (Complainant's third complaint, Para. 2). The third complaint alleges that the label of "commercial requesters" for purposes of a FOIA fee waiver request was improper and contrary to law and that a DOE lawyer had an improper motive of discrimination in giving improper legal advice to DOE about the FOIA request which allegedly caused DOE to charge Complainant $28,000. (Complainant's third complaint, Para. 2).

By letter dated November 20, 1998, Complainant requested a hearing on his third complaint. Without authorization, Complainant issued numerous discovery requests. On December 16, 1998, I issued an Order quashing Complainant's discovery requests; ordering that unless authorized, no further motions were to be filed in this matter; and ordering Complainant to show cause by January 8, 1999, why this matter should not be dismissed.

On January 7, 1999, Complainant filed a Response to the Order to Show Cause. The Response was virtually identical to Complainant's Response to the Order to Show Cause in his second complaint. Once again, Complainant, through counsel, alleges a litany of charges and theories. Further, without authorization, both Respondents submitted Motions to Dismiss. Since my Order of December 16, 1998, stated that unless authorized, no further motions were to be filed in this matter, I will not consider Respondents' Motions to Dismiss in the instant decision.

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contribute" to an understanding of government operations or activities; (C) the contribution to an understanding by the general public of the subject likely to result from disclosure; and (D) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 10 C.F.R. §1004.9(a)(8)(i). If the DOE finds the request satisfies these four factors, it must also consider the following two factors in order to determine whether the disclosure of the information is primarily in the commercial interest of the requester: (A) whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so (B) whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure. 10 C.F.R. §1004.9(a)(8)(ii).

Rather, my decision, as in 99-CAA-1, is based upon the response of Complainant to my Order to Show Cause.

Meanwhile, even before my Decision in the instant case, Complainant filed a fourth complaint with OSHA, 99-CAA-6. In the fourth complaint, Complainant's counsel stated that the "facts in Mr. Rockefeller's first complaint, dated May 9, 1998, and his second complaint, dated October 2, 1998, are incorporated by reference." (Complainant's fourth complaint). The fourth complaint also alleged that the undersigned, DOE, and WEC collusively contrived to serve the Respondents' Motions to Dismiss in the second complaint to the undersigned without properly serving them by equally expeditious means to Complainant's counsel. (Complainant's fourth complaint). Complainant alleged that Respondents' Motions to Dismiss in the second complaint were sent by regular mail to Complainant's counsel, whereas they were sent by Federal Express to the undersigned, who then "prematurely and illegally" granted the dismissals by order dated December 4, 1998. (Complainant's fourth complaint).

On February 19, 1999, the undersigned issued a Decision and Order Recommending Dismissal with Prejudice in 99-CAA-6. In my Decision, I found that Complainant's allegations stated no new valid cause of action, that the motions of Respondents were superfluous, and my Decision and Order had been based solely upon Complainant's failure to meet the Order to Show Cause. I further stated that the additional allegations were a red herring, an attempt to raise issues where none exist, simply to attempt to support the serial filings of the same cause of action. Complainant has appealed my Recommended Decision and Order in 99-CAA-6 to the Administrative Appeals Board.

Currently, at issue in the instant Recommended Decision and Order is Complainant's third complaint, 99-CAA-4.

Analysis

Collateral Estoppel

The allegations of Mr. Rockefeller's first and second complaints, incorporated into this matter, are subject to collateral estoppel. In *Montana v. United States*, the Supreme Court stated: "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits . . . ." 440 U.S. 147, 153 (1979). The Court went on to state that precluding parties from contesting issues they have already had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54.

Collateral estoppel has been invoked in administrative adjudications as well as in other court cases. *See Otherson v. DOJ*, 711 F.2d 267, 272-73 (D.C. Cir. 1983); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3rd Cir. 1981); *Ewald v. Commonwealth of Virginia*, 89-

SDW-1 (Sec'y Apr. 20, 1995).[2] According to the Ninth Circuit, to foreclose relitigation of an issue under collateral estoppel, three elements must be met:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Town of North Bonneville v. Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

In the instant case, the first inquiry is whether the issues at stake in Complainant's third complaint, 99-CAA-4, are identical to the issues alleged in prior litigation. In the first complaint, 98-CAA-10 and 11, Complainant alleged retaliation under the STAA and CAA. In the second complaint, 99-CAA-1, Complainant stated that the facts in the first complaint were incorporated by reference. The second complaint additionally alleged that Respondents DOE and WEC wrongfully induced Judge Lasky to recommend dismissal of the first complaint and the Recommended Decision and Order in 98-CAA-10 and 11 was contaminated by *ex parte* contacts. Further, the second complaint alleged that a DOE lawyer had an improper motive and gave improper legal advice to the AL personnel about Complainant's FOIA request which allegedly resulted in DOE denying Complainant's fee waiver request and attempting to charge him $28,000 for 1200 hours of search time under FOIA. Complainant alleged that the $28,000 charge was an act of discrimination, to impede and delay Complainant's ability to obtain evidence of environmental violations, and in retaliation for engaging in "environmental protected activity." Complainant alleged that Respondents' actions were an obstruction of his Whistleblower rights and a continuing violation under the STAA and CAA.

In this complaint, 99-CAA-4, Complainant states that the facts in the first and second complaints are incorporated by reference. This complaint also alleges that following the decision by the Director of the DOE Office of Hearing and Appeals there is "now no defense on the merits to Mr. Rockefeller's *prima facie* case regarding FOIA harassment by DOE AL." This complaint alleges that the label of "commercial requesters" for purposes of his FOIA fee waiver request was improper and contrary to law and that a DOE lawyer had an improper motive of discrimination in giving improper legal advice to DOE about the FOIA request which allegedly caused DOE to charge Complainant $28,000.

It is apparent from the allegations in Complainant's first and second complaints that the issues at stake in the instant litigation are identical. Complainant does not assert a new valid

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[2] The undersigned is aware of *Coupar v. Federal Prison Industries/Unicor*, 92-TSC-6 and 8 (ALJ June 11, 1992), where an administrative law judge found that collateral estoppel was not applicable with regard to a prior ALJ recommended decision. I do not find the *Coupar* decision persuasive.

cause of action, rather he states that the facts from the first and second complaints are incorporated by reference into his third complaint and merely restates his allegations regarding alleged discrimination by the DOE AL in denying the FOIA fee waiver request. Simply adding an alleged new fact, that a decision was rendered by the Director of the DOE Office of Hearing and Appeals, does not constitute a new and distinct cause of action. Accordingly, I find that the issues at stake in the instant litigation are identical to the issues alleged in the prior litigation.

The second inquiry is whether the issues were actually litigated by Complainant in prior litigation. An issue is actually litigated when it is contested by the parties and submitted for determination by the court. *Otherson*, 711 F.2d at 487. The original allegation of retaliation under the STAA and CAA was contested and submitted to Judge Lasky for determination in 98-CAA-10 and 11. The issue of improper conduct on the part of Judge Lasky was contested by the parties and submitted to the undersigned for determination in 99-CAA-1. Further, with regard to the FOIA discrimination allegation, in Complainant's second complaint he alleged discrimination by the DOE AL in denying his FOIA fee waiver request. Respondents contested this issue in their Motions to Dismiss by arguing that the issues raised by Complainant under the STAA and CAA were barred by the doctrine of collateral estoppel and the Department of Labor lacked jurisdiction over the FOIA allegation. The issue of discrimination in the denial of Complainant's FOIA fee waiver request was submitted to the undersigned for determination in 99-CAA-1. For these reasons, I find that the issues raised in Complainant's third complaint were actually litigated in prior litigation.

The third inquiry is whether the determination of the issues in the prior litigation were a critical and necessary part of the judgment in the earlier action. An issue is not critical and necessary if the previous decision could have been rationally grounded on an issue other than that which the respondent seeks to foreclose from determination. *Little v. United States*, 794 F.2d 484, 487 (9th Cir. 1986). In 98-CAA-10 and 11 the only issue for determination was retaliation under the STAA and CAA. The Recommended Decision and Order issued by Judge Lasky was based solely upon whether Complainant satisfied the requirements of the Whistleblower provisions of the STAA and CAA, it was not grounded on any other issue. In 99-CAA-1 the issues for determination were the allegations of improper conduct on the part of Judge Lasky and discrimination in the denial of Complainant's FOIA fee waiver request. In my Recommended Decision and Order I considered and decided each issue independently. Specifically, I found that Complainant's Response to the Order to Show Cause contained no facts to support the allegations of improper *ex parte* contacts and undue influence and that the Declaration of Complainant's counsel only detailed his experience and expressed his opinions. Further, I separately addressed the FOIA allegation and determined the fact that one of the Respondents wished to charge a copying fee for Complainant's FOIA request did not state a cause of action under the Whistleblower provisions. Therefore, I find that both the issue of improper conduct and the issue of discrimination in the denial of Complainant's FOIA fee waiver request were critical and necessary to my decision in 99-CAA-1.

Accordingly, since all three elements are satisfied, I find that the allegations of

Complainant's third complaint are subject to collateral estoppel. Furthermore, for the reasons set forth below, even if the doctrine of collateral estoppel is not applied in the instant case, Complainant's third complaint fails to prove the essential elements of a violation of the employee protection provisions of the STAA or the CAA.

Cause of Action under the Surface Transportation Assistance Act

Section 405(a) of the STAA prohibits a person from discharging, disciplining or discriminating against an employee on the ground that he has filed a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding." 49 U.S.C. § 31105(a)(1)(A). Additionally, an employee may not be discharged, disciplined or discriminated against on the ground that he refuses to operate a vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B). In order to establish a *prima facie* case under the STAA, the complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he was subjected to adverse action; and (3) the respondent was aware of the protected activity when it took the adverse action. Additionally, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992); *Osborn v. Cavalier Homes of Alabama, Inc.*, 89-STA-10 (Sec'y July 17, 1991).

Complainant has failed to state a cause of action against DOE within the jurisdiction of the U.S. Department of Labor under the STAA. An employee is defined under the STAA, and the regulations enacted thereunder, as "any individual other than an employer; who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment." 29 C.F.R. §1978.101(d)(4); *see also* 49 U.S.C. §31101(2)(A)(B). The STAA defines employer as any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it in commerce, but such term does not apply to the United States, a State, or a political subdivision of a State. 49 U.S.C. §31101(3)(A)(B); *Killcrease v. S&S Sand and Gravel, Inc.*, 92 STA 30 @ 2, n.1 (Sec'y, Feb. 2, 1993). It is undisputed that Complainant was an employee of the United States Department of Energy as a GS-13 Environmental Specialist from April 1993 to December 1997; therefore I find that he is clearly statutorily exempt from the employee protection provisions of the STAA.

With regard to Complainant's allegations against WEC, Complainant has not proven the essential elements of a violation of the STAA. Complainant does not claim to be an employee of WEC; does not allege that WEC did anything with reference to his employment with DOE; does not allege that WEC knew of any protected activity that he engaged in; does not allege that WEC took any adverse action against Complainant for his alleged protected activity; and fails to allege

that WEC is capable of providing a remedy to Complainant under the STAA. As a result, I find that Complainant has failed to prove the essential elements of a violation of the employee protection provisions of the STAA.

Cause of Action under the Clean Air Act

The CAA's employee protection provision provides in relevant part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter . . .
>
> (3) assisted or participate or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. §7622(a); *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6 and 95-CAA-5 (ARB June 14, 1996).

In order to establish a *prima facie* case of a violation of CAA's employee protection provisions, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer took adverse action against the complainant; (3) the employer was aware of the protected activity at the time it took the adverse action; and (4) the complainant must raise the inference that the protected activity was the likely reason for the employer's adverse action against him. *See Shelton v. Oak Ridge National Laboratory*, 95-CAA-19 (ALJ Mar. 3, 1998) (citing *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB June 14, 1996); *Saporito v. Florida Power and Light*, 94-ERA-35 (1996); *Jackson v. The Comfort Inn, Downtown*, 93-CAA-7 (Sec'y, Mar. 16, 1995); *Mackowiak v. University Nuclear Systems*, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984).

To establish the first element of Complainant's *prima facie* case, he must prove that he has engaged in protected activity. On August 4, 1998, Complainant, through his counsel, filed a FOIA request with the DOE AL in order to obtain records of environmental violations and violations of the employee Whistleblower provisions. Specifically, Complainant requested copies of the following records: (1) the telephone records of several AL employees; (2) any DOE legal bills for Whistleblower issues; (3) legal audits of AL and DOE's Carlsbad Area Office; (4) a government ethics file for a former Carlsbad Area Office manager; and (5) any and all documents regarding Complainant that exist in AL, the Carlsbad Area Office, the Office of Hearings and Appeals, DOE Headquarters, or WEC. In his FOIA request, Complainant's counsel stated that a full fee waiver was appropriate because the FOIA request was in the public interest of preventing, detecting, and exposing government fraud. Considering the documents requested by Complainant are likely to contain information relating to his allegations of environmental

violations and violations of the employee Whistleblower provisions, I find that the FOIA request and request for a fee waiver were actions to assist in carrying out the purposes of the employee protection provisions of the CAA and therefore constitutes protected activity.

To establish the second element of Complainant's *prima facie* case, he must prove that the DOE took adverse action against him. Complainant argues that the DOE AL's denial of Complainant's request for a fee waiver on September 24, 1998, was an adverse action under the CAA. Once a FOIA fee waiver request is made, the DOE must determine whether the requirements for a fee waiver have been met. The DOE regulations require that they consider specifically delineated factors in a particular sequence. After considering each factor, the DOE determined that Complainant's action was personal in nature, that Complainant's counsel made the request in his own commercial interest, and that Complainant's request was not likely to contribute significantly to public understanding of the operation and activities of the government. Not every action by the DOE that makes an employee unhappy constitutes an adverse action. The fact that the DOE ultimately concluded Complainant and his counsel did not satisfy the required elements of the DOE regulations does not alone constitute a retaliatory adverse action for purposes of the CAA.

Further, the fact that the Director of the Office of Hearings and Appeals stated in a footnote that he disagreed with the DOE AL's conclusion regarding Mr. Slavin's designation as a "commercial requester" does not provide an absolute defense on the merits to Complainant's *prima facie* case regarding FOIA harassment as argued in Complainant's third complaint. The Director's comment in the footnote regarding Mr. Slavin's status was not a determining factor in the decision. The Director determined that Complainant was not entitled to a fee waiver because the release of the requested material would not contribute to the general public's understanding of the subject and therefore the Director did not even reach the issue of Complainant or his counsel's status as a "commercial requester." For these reasons, I find that Complainant has not established the second element of his *prima facie* case in that he has not established that the DOE AL took adverse action against him as defined under the CAA.

For purposes of analysis, I will discuss the remaining elements of Complainant's *prima facie* case. With regard to the third element, Complainant filed his FOIA request and request for a fee waiver directly with the DOE. Therefore, I find that the DOE was aware of Complainant's protected activity at the time they engaged in the allegedly adverse action.

Finally, to establish the fourth element of Complainant's *prima facie* case, he must raise the inference that the protected activity was the likely reason for the alleged adverse action. In this case, Complainant has not offered any credible facts or other evidence to support the inference that DOE retaliated against Complainant because of his attempt to obtain evidence of environmental violations and violations of the employee Whistleblower provisions through his FOIA request. Complainant has presented no credible evidence of any retaliatory motive on the part of DOE or that a DOE lawyer had an improper motive in giving allegedly improper legal advice to the DOE AL regarding the fee waiver request. That the Director of the Office of

Hearings and Appeals stated in a footnote that they disagreed with the DOE AL's conclusion regarding Mr. Slavin's designation as a "commercial requester" is not evidence that the DOE's denial of the fee waiver request was done in retaliation for Complainant's protected activity. Therefore, I find that Complainant has failed to establish the required nexus between the protected activity and the allegedly adverse action by the DOE. For these reasons, I find that Complainant has failed to establish a *prima facie* case against DOE of a violation of CAA's employee protection provisions.

With regard to Complainant's allegations against WEC, Complainant has not proven the essential elements of a violation of the CAA. Complainant does not allege that he was an employee of WEC; does not allege that WEC did anything with reference to his employment with DOE; does not allege that WEC knew of any protected activity he engaged in; does not allege that WEC took any adverse action against Complainant for his alleged protected activity; and fails to allege that WEC is capable of providing a remedy to Complainant under the CAA. Therefore, I find that Complainant has failed to prove the essential elements of a violation of the employee protection provisions of the CAA.

ORDER

It is recommended that the complaint of Tod Rockefeller against the Department of Energy and the Westinghouse Electric Company under the Surface Transportation Assistance Act and the Clean Air Act be dismissed, with prejudice.

EDWARD C. BURCH
Administrative Law Judge

ECB:mw

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).